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February 14. 1771.

ANSWERS

F O R

Janet Aitken, widow of John Grant late shipmaster
in Kirkaldy, and John Aitken her assignee,

T O

The PETITION of James Seton merchant in
Edinburgh.

THE late John Grant was employed by several persons, amongst others by the petitioner, to build and fit out a ship of which he was to be master. The ship being built in Grant's name, venditions were made to the persons concerned, agreeable to their respective interests; one eighth share belonging to the petitioner; who, by some means or other, getting the charge of receiving and disbursing the money, soon discovered, by charging commission, which he was careful to do, he was certain of making 20 *per cent.* on his small share, though every other owner should be a loser. And so great were the profits he drew from this adventure, that he acquired right to two sixteenths more of the vessel, making in all one fourth.

Mr Grant having died, the ship was sold by the petitioner, without any authority from Mrs Grant, or her husband's representatives; and being ignorant of her husband's affairs, she took no measures to obtain a clearance with the petitioner.

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But several processes were raised against Mr Seton, at the instance of her husband's creditors, without her knowledge or consent. All of them, however, were set aside upon informalities; and Mr Seton availed himself of these informalities, by unjustly with-holding what the respondent had right to.

Mrs Grant having discovered that her husband's effects were more than sufficient to pay his debts, and the creditors being willing to trust to her and Mr Aitken for payment, she confirmed her husband's share of the ship, as still *in bonis de-functi*, and then arrested. The purchaser having recurred on Mr Seton upon his warrandice, was the first thing that brought the petitioner to reason, and made him propose to submit all their differences to Mr Thomas Boswell accountant in Edinburgh. This was cheerfully agreed to by the respondents, and a submission was accordingly entered into.

An account of charge and discharge was given in by Mr Seton; which the respondents were allowed to see: but the account being extremely unfair, in place of objecting to it, they gave in a new account, stating the different claims they had against Mr Seton; from which it appeared, that he was debtor to them in near L. 200 Sterling.

The arbiter, in place of adopting either of these accounts, drew out one for himself; and to which objections were made by both parties. How far these objections were repelled, or sustained, the respondents cannot pretend to say; as the arbiter, in place of referring to a particular account, has decreed in general for L. 128; and in doing so seems to have struck a medium betwixt the claims of both parties.

Dated and registered, Feb
12 1770.

The decret is in the following terms. " I find and declare, That the said James Seton is equally resting and owing to the said Janet Aitken, widow and executrix of the said John Grant, and to John Aitken her assignee, at the date hereof, the sum of L. 128 Sterling, being in full of the balance of all accounts betwixt the said James Seton and John Grant, arising from his fourth part of the price of the ship Happy Betty, sold by the said James Seton, for
" behoof

" behoof of himself and the other owners, and from the
 " freights of the said ship received by him, and otherwise;
 " therefore I decern and ordain the said James Seton, and
 " his heirs and executors, to make payment to the said Janet
 " Aitken, or to the said John Aitken her assignee, of the said
 " sum of L. 128 Sterling; and that against the 1st of March
 " next, with the interest thereof from the date hereof, and in
 " time coming, during the not payment of the same; and
 " upon payment of the said sum, and interest thereof, I find
 " and declare, that the said parties submitters have nothing
 " to claim, the one from the other, upon account of the sale
 " of the said ship, freight, or profits thereof, charges and
 " expences attending the management, processes mentioned
 " in the said submission, or any thing else in relation thereto
 " in any sort whatever; and I do hereby decern and ordain
 " the said parties to discharge each other accordingly. But
 " before payment of the said sums, I find and declare, that
 " the said John Aitken must purge all arrestments used in
 " the hands of the said James Seton by any of the creditors
 " of the said John Grant."

A suspension of this decret coming before Lord Pitfour
 Ordinary, it was insisted for the suspender, That the decret
 ought to be reduced, as the arbiter had committed an error
 or oversight in allowing to the respondents the sum of L. 15,
 15 s. for John Grant's trouble in attending the building of
 the ship, and for which it was alledged he had formerly re-
 ceived L. 26, 5 s. This was the only objection which was at
 first made against the decret, though in the petition now to
 be answered another objection is made, viz. L. 10, arising
 from a mistake in addition.

It was answered on the part of the respondents, That de-
 creets-arbitral can only be reduced upon the head of false-
 hood and corruption; and as none of these were objected to
 this decret, the objections ought to be repelled.

At the first hearing of the cause, his Lordship was fully sa-
 tisfied,

tisfied, that the decret could not be reduced upon the grounds insisted on; and it appearing, from what was then stated, as well as from the known accuracy of the gentleman who pronounced this decret, that the objection itself was unjust and groundless, his Lordship repelled the reasons of suspension, and found the letters orderly proceeded. And to this interlocutor his Lordship adhered, upon advising representation and answers, upon the 28th November 1770. This interlocutor was put up in the minute-book, and the process borrowed up by the petitioner upon the 29th November, the day after the interlocutor was signed.

Though the process was in the petitioner's hand, yet no step was taken by him to obtain an alteration of these interlocutors; and becoming final, sixteen days having elapsed since pronouncing last interlocutor, the respondents inrolled the cause upon the 14th December, and craved to be allowed the expence of process. This his Lordship refused to grant; and the respondents were satisfied to pass from them; but no interlocutor was wrote out, nor any signature made at this calling. And, as far as the respondents can recollect, the petitioner did not, at this time, insist to have the interlocutor opened; but only in general said, That if it had not become final, he could have satisfied his Lordship, that the decret-arbitral ought to have been set aside.

After this, the respondents were a good deal surpris'd, when they saw the cause appear in his Lordship's roll on the 20th December; and, from the minutes of debate, it appears, that the petitioner insisted, That it was still competent to him to represent in the cause, although the reclaiming days were run, as he could show many cases where the court had got over that. The Lord Ordinary was clearly of opinion, that it was not competent to enter into the merits of the cause. "And in respect it was admitted, that the reclaiming-days were elapsed, found it not now competent to judge in the points already determin'd: but found no expences due."

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As it had been alledged, that instances could be produced, where the court had over-ruled objections of this kind, his Lordship was pleased to supersede extract till the fourth federunt-day of January, in order that the petitioner might have time to produce such cases.

No other objection was hitherto made against the decret-arbitral; but a long representation was presented, where it was argued at great length, that it was still competent to Mr Seton to represent; and insisted, that the decret should be reduced, not only upon the error of L. 15, 15 s. formerly stated; but also upon a new reason, that the arbiter had committed another blunder, from an error in addition, to the extent of L. 10. This representation was also refused.

A petition has been presented, craving a review of these interlocutors; and your Lordships were pleased to ordain the same to be answered, both as to the competency and the merits. Jan. 19. 1771.
Feb. 5. 1771.

The respondents shall first submit to your Lordships consideration, if the interlocutors complained of are not become final, by the petitioner's not applying for an alteration within the days fixed by act of federunt?

The respondents, with submission, apprehend, that the petitioner is in a great mistake in arguing, that the reclaiming-days do not run from the date of the interlocutor, but from the time that the process is returned to the clerk.

The confusion that would attend such a practice, must occur to every person. If that were to be the case, greater credit would be given to the clerk, than to the date affixed by the judge; and it would, in a great measure, depend upon the memory and veracity of the clerk, to determine when the reclaiming-days were run. But, by the express words of the act of federunt, which fixes the number of days within which parties are to represent to the Ordinary, it is declared they run from the date of the interlocutor. " And because great delays are Act federunt,
Feb. 15. 1773.

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" nary,

" nary, from the parties not timeously applying by representation for a review ; therefore the said Lords enact and declare, That after the elapsing of ten sederunt-days *from the date of the Lord Ordinary's interlocutor*, no party shall be allowed to represent any thing to the Ordinary against the said interlocutor."

But in the present question, there is no occasion to dispute this point. For, in fact, the process must have been returned to the clerk the very day the interlocutor was signed : for, upon the 29th, the day after, it is put up in the minute-book, and the process is borrowed up that same day ; as appears from the receipt in the clerk's books.

Your Lordships therefore see, that the whole of the petitioner's argument upon this head falls to the ground, and goes for nothing, as it proceeds upon the mistake, that the process was kept up by the Lord Ordinary for three days after the interlocutor was signed.

Your Lordships will further observe, that no catch was taken of the petitioner in this case : he was in possession of the interlocutor from November 29. the day after it was signed, till the 14th December, when the respondents inrolled the cause, craving expences. And what he says, of his intending to represent, but was prevented by that inrolment, is nothing to the purpose : for by that time, not only was the interlocutor become final, sixteen days having elapsed since pronouncing it ; but supposing it had not, the petitioner ought to have known, that by the forms of court an interlocutor cannot be opened by an inrollment, but only by a representation.

It is, therefore, with submission, maintained, that the representation to the Lord Ordinary, and the petition to the court, is altogether incompetent, being directly contrary to an express act of sederunt, and the established forms of court. Your Lordships must also be convinced, that the petitioner himself was satisfied with the justice of this interlocutor, no
step

step being taken by him for so long a time to obtain an alteration of it.

The decisions referred to on this head, do not in the least apply to the present question. In the case of Grant, an evident catch was intended: for there the interlocutor was pronounced on the 22d December, and within two days thereafter, upon the 24th, the court rose; after which no representation could be presented till after the Christmas vacation; so that there were only two days on which a representation could have been presented: but the charger, during the vacation, thought proper to extract the decret. The other case, of Brown *contra* Laurie, the defender there founded his defences upon a writing, which, if it had been produced, would have been decisive of the cause: but, unluckily for him, being mislaid, and not to be found, your Lordships discerned against him. In the mean time, the strictest search was made by him for the paper, and upon the very last reclaiming-day it was discovered. A petition being presented, and the paper produced, your Lordships remitted to the Lord Ordinary to proceed as he should see cause; and the question is still in dependence. These cases, therefore, are entirely different from the present question: no catch was here taken of the respondent; and he himself was in possession of the interlocutor for a much longer time than what is allowed by the act of federunt, and no step taken by him during that period to obtain an alteration.

No new production is now made, or any thing now founded on that was not formerly in process, and considered by his Lordship. For although at first sight it may appear, that it is only final with regard to the L. 15, 15 s. which was the only thing disputed before the Ordinary; and that it is still competent to inquire into the new alledgeance of the L. 10, as a fact *noviter veniens ad notitiam*; yet when it is inquired into, it is, with submission, thought that your Lordships will be of opinion, that the interlocutor, finding the letters orderly proceeded

ceeded for the sum in the decret, is final as to this article also.

When decreets are opened up upon facts which the parties have only got knowledge of since pronouncing the interlocutor, the discovery of such facts must arise, either from writings, of which the party had not the custody, or from circumstances of which he had no opportunity of knowing: for if it were to be done upon facts arising from writings in the party's own custody, there hardly would ever be an end of a law-suit; for no sooner would one objection be repelled, than a new one might be stated. Your Lordships will observe, that the petitioner founds upon an account-book, from which it is alledged this error appears. This book was produced by the petitioner himself, and has continued in process since the commencement of it; he therefore ought to have known of this alledged error, and to have stated it to the Lord Ordinary: and if he really did not know, he has only himself to blame for neglecting to examine the book, which was so often in his hands: and though your Lordships were to consider it as a relevant objection, (which shall by and by be shown it is not); yet not having been offered before pronouncing decret, it must be held as omitted, and although competent, cannot now be proponed, agreeable to act of parliament 1672, c. 16.

The respondents, in obedience to your Lordships, shall now submit, how far the objections against the decret-arbitral could have been sustained, if the Lord Ordinary's decree had not been final.

The respondents found upon a decret-arbitral, which decerns for a certain sum, without referring to a particular account, or mentioning the different articles from which it arises; and the sum decerned is considerably under what the respondents claimed, or what they apprehend they had a right to. The respondents would then beg leave to ask, from what

what part of the decret it appears that either of the sums of which deduction is claimed, makes any part of the L. 128.

The respondents, for peace sake, and at the desire of the petitioner, entered into a submission. They have reason to believe that a greater sum would have been given them by a court of law, than what has been done by the arbiter; and as one of the inducements of entering into the submission was, the expectation of sooner recovering their money, unjustly withheld by Mr Seton, than what they could have done in any other way, they acquiesced in the decree; and as the arbiter pronounced this decree upon the maturest deliberation, it would be extremely hard to make them enter into an investigation of the grounds upon which he proceeded, and of what articles the sum decerned for is made up. This would be entirely taking away the principal end and design of submissions, which were intended to prevent law-suits; and the legislature, sensible of the advantages arising from them, has fortified decreets-arbitral by the authority of statute, and wisely provided, that they cannot be reduced upon slight and frivolous pretences, but only upon the head of bribery, corruption, and falsehood. None of these are here insisted on; nor does the least iniquity or injustice appear to have been done to either party by this decret-arbitral.

It is therefore, with great submission, clear, that although the question had been entire, yet still your Lordships could not have suspended this decret upon the grounds insisted on by the petitioner, they being none of the reasons on which our law allows decreets-arbitral to be reduced.

Had an account been referred to as the grounds upon which the arbiter proceeded, and the petitioner had offered to instruct the falsehood of some of the articles in that account, this at least would have had some appearance of relevancy; though, from the authority of your Lordships judgments, the respondents maintain, that even this would not have been sufficient to have suspended the decret, as the

court has "refused to sustain, as a reason of suspension, an-
 "allegiance, that some facts mentioned in the decret as
 "the foundation of the decerniture, were utterly false, which
 "was offered to be proven by the oaths of the arbiters them-
 "selves; Dict. title *Arbitration*."

The petitioner has produced an account, which he says was the foundation of the decret, and from which the alleged errors will appear. But, in the *first* place, This can only be his own imagination; nor can it be known to any person but the arbiter himself, no such account being referred to in the decret: and although an account was shown to the parties; yet as some of the articles mentioned in it were objected to by Mr Seton, and claims not taken notice of insisted to be allowed to the respondents, it is impossible to say how far the arbiter may have sustained the objections made to some of the articles, and how far he may not have allowed others claimed by the respondents. And it is impossible for any person to say, whether the L. 15, 15 s. and L. 10, make up any part of the L. 128 decerned for. But if they do, the arbiter's known accuracy in business must satisfy your Lordships, that they were most justly allowed, and upon the maturest deliberation, these being some of the articles objected against on the part of Mr Seton.

But, *2dly*, The truth or justice of the petitioner's allegations does not appear from the account which he is pleased to say was the foundation of the decret; but your Lordships must go a step farther back, and consider an old memorandum-book, which the petitioner says was what the arbiter made out his account from.

The account itself makes no reference to the memorandum-book; nor does it appear, that it was under the arbiter's consideration. Besides, the book itself, which the petitioner would pass as a regular fitted account, consists of nothing but irregular jottings, intended for the aid of the memory, and is erased and blotted in many places.

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That decreets-arbitral can be reduced as *ultra petita*, or *ultra vires*, cannot in the least apply to the present decree. For supposing the respondents were to admit, that what was due for Mr Grant's trouble in attending the building of the ship was finally settled in his lifetime, and he himself had received payment, by getting credit for this article, as mentioned in p. 6. of petition; yet, as has already been shown, it does not appear, that any sum has been allowed him for such attendance.

The decision quoted to support this argument, does not apply to the present question. There the matter expressly submitted was the expence of a criminal process: but it appeared from the decret, that the arbiter had decerned for a surgeon's account as part of expences; and besides, several other nullities occurred in the decret.

With regard to resubmitting this question, as mentioned in the petition, the fact is, that Mr Boswell, conscious that his decret was well founded, and tired with the delays of the petitioner, declared he would have no more concern in this affair; and when the suspension was first raised, he advised Mr Seton to submit to the decree; and that he would only involve himself in expences by opposing it.

The respondents have now only further to take notice of Mr Seton's holograph letter to Mr Aitken, which is in the following terms. " Sir, Agreeable to Mr Boswell's decret-
 " arbitral, am ready to pay the money to-morrow, on your
 " getting the arrestment laid in my hand loosed, which lies
 " at your door; and if not done, will not pay any interest.
 " This I thought proper to acquaint you," &c.

Edinburgh,
Feb. 28. 1770.

This letter, it is, with submission, maintained, would have been sufficient to have barred Mr Seton from insisting in a reduction, even upon the grounds allowed by law, as a stronger homologation than this cannot be figured. And as to the letter being wrote before the petitioner had seen or examined the decret, it will hardly gain credit, when your
 Lordships

Lordships are informed, that the decret had been in the register sixteen days, and an extract got out by Mr Seton previous to his writing the letter. And indeed the words of the letter confute what is said in the petition, and evidently shows, that the writer must have seen the decret before he wrote the letter: for if he had not, how could he have known he was liable in interest, and that it lay upon the charger to purge incumbrances, and loose arrestments. In fine, the words of the letter seem to have been copied from the decret.

The respondents have argued the cause at greater length than they apprehend is necessary. They rest upon this alone, that the decree charged on decerns for a general sum, without referring to any account. This sum is considerably under what was claimed by the respondents. It is therefore impossible to say, that the L. 15, 15s. or L. 10, claimed to be deduced, make up any part of the L. 128, the sum decerned for; nor, with great submission, can your Lordships inquire into the grounds upon which the arbiter proceeded; especially as nothing appears from the decret itself upon which it can be reduced.

The greatest regard has been paid to decreets-arbitral by the laws of this country; and it has never been understood, that they could be reduced or suspended upon any inaccuracy or omission, the only grounds upon which they can be reduced being upon the head of corruption or falsehood; and the legislature seems to have had in view the maxim of the Civil law, *Stari debet sententie arbitri, sive æqua, sive iniqua sit*, when it enacted, "That, for the cutting off of groundless and expensive pleas and processes in time coming, the Lords of Session sustain no reduction of any decret-arbitral that shall be pronounced hereafter, upon a subscribed submission, at the instance of any parties submitters, upon any cause or reason whatever, unless of corruption, bribery, or falsehood," *Reg. 1695.*

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The petitioner would make your Lordships believe, that he was greatly hurt by this decret, and to a considerable sum. But that is not so. For, supposing it were to be admitted, that the arbiter had committed blunders; and it appeared, that the errors alledged were just, his share of the deductions would be very trifling. The two sums of which deduction is asked amount to L. 25, 15 s.; and of this sum only one fourth belongs to the suspender, being L. 6 : 8 : 9; and if only the L. 10 was to be deduced, his share is only L. 2, 10 s. For, with respect to the shares of the other owners, he can have no title: and as the arbiter has found, that the respondents have still claims against them, they have more than sufficient in their hands to compensate their shares of these supposed errors, in case they were to make any claim for them.

Upon the whole, the respondents hope they have shown your Lordships, that the petition reclaiming against the Lord Ordinary's interlocutors is altogether incompetent; the petitioner himself, though possessed of the process from the very date of the interlocutor, taking no step to obtain an alteration of it till the reclaiming-days expired; nor has the smallest reason been given for this delay; nor is any thing stated as to the L. 15, 15 s. that was not before the Lord Ordinary. And as to what is now advanced with regard to the L. 10, if the objection is competent, it ought to have been stated to the Lord Ordinary; and since it has been omitted, it cannot now be received. And supposing it were still competent for your Lordships to judge of the merits of the question, they hope they have shown, that the reasons of suspension fall to be repelled, as the decree decerns for a general sum, considerably under what was claimed, without referring to any particular articles or account; and it is not competent for your Lordships to overhaul the whole proceedings of the arbiter, and inquire into the grounds upon which he went.

In respect whereof, &c.

CLAUD BOSWELL.